Supreme Court, U.S.
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No. 00-878

In the Supreme Court of the United States

RICHARD L. MATHIAS, ET AL.,

Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state commission's action relating to the enforcement of a previously approved section 252 interconnection agreement is a "determination under [section 252]" and thus is reviewable in federal court under 47 U.S.C. § 252(e)(6).

2. Whether a state commission's acceptance of Congress's invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.

3. Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

RULE 29.6 STATEMENT

Respondent Illinois Bell Telephone Company. d/b/a Ameritech Illinois ("Ameritech") is a wholly owned subsidiary of Ameritech Corporation, which is in turn a wholly owned subsidiary of SBC Communications Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. No publicly held company owns 10% or more of the stock of SBC Communications Inc.

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BRIEF FOR ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS IN OPPOSITION

STATEMENT

A. Federally Mandated Interconnection "Agreements" Under The Telecommunications Act of 1996. This case arises under the federal Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*) ("the 1996 Act" or "the Act"). The 1996 Act establishes a "new federal regime" that "fundamentally restructures local telephone markets" and thus "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 378 n.6, 397 (1999). As Justice Scalia's opinion for the Court explained, "the question" under the Act "is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. *With regard to the matters addressed by the 1996 Act, it unquestionably has.*" *Id.* at 378 n.6 (emphasis added).

The "key provisions by which Congress sought to open local telecommunications markets to competition are 47 U.S.C. §§ 251 and 252." *Pacific Bell* v. *Cook Telecom, Inc.*, 197 F.3d 1236, 1237 (9th Cir. 1999). Sections 251 and 252 of the Act govern the formation and content of "interconnection agreements," which are the federally mandated means of implementing the local competition provisions of the Act. Notwithstanding their nomenclature, interconnection "agreements" are nothing like private commercial contracts. If private parties are unable to reach agreement after arms-length negotiations, they simply can walk away from the bargaining table. Under the Act, however, Congress has (i) compelled incumbent local exchange carriers ("LECs") to enter into "agreements" that permit competitors to obtain access to incumbent LEC networks at cost-based rates, and (ii) subjected

incumbent LECs to "a host of duties intended to facilitate market entry" by competing LECs. *AT&T Corp.*, 525 U.S. at 371.

Upon receiving a request for interconnection from a competing LEC, an incumbent LEC, like Ameritech, "may negotiate and enter into a binding agreement" with the requesting carrier. 47 U.S.C. § 252(a)(1). If, however, the incumbent LEC does not agree to include in its interconnection agreement what a competing carrier believes to be statutory or regulatory requirements, that carrier has a right to ask a state commission (or the FCC, if the state commission fails to act) to compel the incumbent to include those purported requirements in a so-called "agreement." An incumbent LEC may not escape the obligation to enter into section 252 agreements, even if such agreements would be illegal under state law. Moreover, under section 252(i) of the Act, the terms and conditions that are incorporated into a particular agreement must be made available to any other carrier that requests them. 47 U.S.C. § 252(i). In short, the Act sets forth a detailed substantive and procedural framework for imposing a web of *federal* statutory and regulatory obligations on incumbent LECs, and section 252 interconnection "agreements" are the regulatory vehicles for implementing this Congressional compulsion.

B. The Process For Entering Into A Section 252 Interconnection Agreement. Section 252 of the Act prescribes the process through which a competing LEC may arrive at an agreement with an incumbent LEC for the performance of the duties established in section 251. The section 252 process essentially involves four steps: (i) negotiation, (ii) arbitration, (iii) approval (or rejection), and (iv) judicial review. At every stage of the process, federal law sets the pertinent standards. To begin the process, a competing LEC asks to negotiate an interconnection agreement with the incumbent LEC. 47 U.S.C. § 252(a)(1). The parties may reach

an agreement through negotiations alone. *Id.* Alternatively, either party may file a petition with the state utility commission for arbitration of "any open issues" regarding the interconnection agreement. 47 U.S.C. § 252(b)(1).

In conducting section 252 arbitrations, the state regulators are authorized to "impos[e] appropriate conditions as required to implement [section 252(c)]," provided that any conditions they impose comply with section 251 and the Federal Communications Commission's ("FCC") rules implementing it. 47 U.S.C. §§ 252(b)(4)(C) and 252(c)(1); see also *AT&T Corp.*, 525 U.S. at 373 (noting that section 252 arbitrations are "subject to § 251 and the FCC regulations promulgated thereunder"). Although a state commission may impose the requirements of the Act upon an incumbent when the parties do not agree what those requirements are (47 U.S.C. § 252(b)), the commission has no authority to alter the obligations prescribed by a previously approved "binding" agreement, *id.* § 252(a)(1).

Once the parties reach an agreement, whether through arbitration or negotiation, they must submit the agreement to the state commission for approval. 47 U.S.C. § 252(e)(1). The state commission then must determine whether to approve or reject the agreement, applying the standards set forth in the Act. 47 U.S.C. § 252(e)(2). And any post-approval "dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements" also lies within "the states' 'responsibility' under section 252" of the Act. *In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, FCC No. 00-216, ¶ 6 (rel. June 14, 2000) ("*Starpower*"). As the FCC has observed, "[s]tate commission determinations that interpret and give effect to interconnection agreements are often the principal mechanism for establishing the substance of the parties' obligations under

the 1996 Act." Brief for the United States and the FCC as Intervenors in *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, No. 99-3952, at 19 (8th Cir. filed Mar. 22, 2000).

As the foregoing demonstrates, state regulators who participate in the federal scheme are not simply "allowed to do their own thing" (*AT&T Corp.*, 525 U.S. at 378 n.6); rather, they "must hew" to the lines drawn by the Act, the federal courts, and the FCC. *Id.* The mechanism for ensuring that state regulators comply with the Act is 47 U.S.C. § 252(e)(6). After the state regulators make a determination with respect to the rights and obligations of the parties, section 252(e)(6) authorizes "any party aggrieved" by a "determination" under section 252 to bring an action in "Federal district court" to determine whether the final agreement "meets the requirements of" sections 251 and 252.

Because Congress may not commandeer state commission participation in the Act's federal regulatory scheme, the Act provides a parallel regulatory scheme pursuant to which the FCC performs the regulatory tasks in the place of non-participating state regulators. If state regulators choose not to accept their "role" as "'deputized' federal regulator[s]" (*MCI Telecomms. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000), petitions for cert. filed, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (No. 00-653), 69 U.S.L.W. 3346 (U.S. Nov. 6, 2000) (No. 00-744)), the Act mandates that the FCC "shall issue an order preempting the State commission's jurisdiction" of the proceeding in question, and "shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." 47 U.S.C. § 252(e)(5). The FCC's obligation to stand in the shoes of non-participating state regulators extends to every aspect of the regulatory responsibilities under section 252, including the interpretation and enforcement of disputed

terms of an agreement. *Starpower*, ¶¶ 6-9. And like state commission "determinations under [section 252]," FCC determinations are subject to exclusive federal judicial review (47 U.S.C. § 252(e)(6)) in the federal courts of appeals under the Hobbs Act (47 U.S.C. § 402(a); 28 U.S.C. § 2342).

Federal judicial review of determinations relating to section 252 agreements, whether those determinations are made by a state commission or by the FCC, obviously is a crucial feature of the post-Act regime. As this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *AT&T Corp.*, 525 U.S. at 378 n.6. Section 252(e)(6) preserves national uniformity in the application of the 1996 Act, notwithstanding the involvement of state regulators in implementing that law. Under section 252(e)(6), if state officials are "not regulating in accordance with federal policy," there is "no doubt" that the "federal courts * * * may bring [them] to heel" by "draw[ing] the lines to which they must hew." *AT&T Corp.*, 525 U.S. at 378 n.6.

C. The Interconnection Agreements At Issue In This Case. Because section 252 agreements implement the requirements of the Act, parties to those agreements often use language that "tracks the controlling law" in order to make clear that the rights and obligations prescribed by the agreements are limited to those prescribed by the Act. As the Fourth Circuit has held, "[w]here a provision plainly tracks the controlling law, there is a strong presumption that the provision was negotiated with regard to the 1996 Act and controlling law," and therefore is intended to "comply with" and implement "the requirements of the Act." *AT&T Communications of Southern States, Inc.* v. *BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000).

As required by the Act, Ameritech entered into interconnection agreements with several competing LECs.

Those agreements clearly state that the parties' rights and duties are what federal law says they are, generally and with respect to reciprocal compensation in particular. Of the agreements at issue in this case, four state that they "set forth * * * the terms and conditions under which the Parties interconnect their networks and provide other services *as required by the Act* as set forth herein." The fifth provides that "[t]he parties acknowledge that [their] respective rights and obligations * * * are based on the text of the Act and the rules and regulations promulgated thereunder by the FCC and the Commission as of the Effective Date."

As required by section 251(b)(5) of the Act, the agreements establish reciprocal compensation arrangements between the parties. And, again, those agreements clearly state that the parties' reciprocal compensation obligations are "as required by the Act." The reciprocal compensation provision in each agreement appears under a heading that cites the reciprocal compensation provision in the Act: "Reciprocal Compensation Arrangements - Section 251(b)(5)." And all five agreements specifically provide that the parties' reciprocal compensation arrangements are "As Described in the Act" (SA48; SA57; SA80; SA89; SA100)[1], which is in turn defined in each agreement to mean "as described in or required by the Act" (SA39; SA53; SA71; SA85; SA96).

D. The Proceedings Below. In 1997, various competing LECs filed complaints against Ameritech in the Illinois Commerce Commission ("ICC"), alleging that Ameritech had failed to comply with its obligation to pay reciprocal compensation on Internet traffic under its section 252 interconnection agreements. As noted above, those agreements provided in relevant part that the parties' reciprocal

[1] "SA" refers to Ameritech's Separate Appendix in the court of appeals.

compensation arrangements are "As Described in the Act," which is in turn defined to mean "as described in or required by the Act." The ICC Commissioners, invoking "jurisdiction under the [Illinois] Public Utilities Act and Section 252 of the Telecommunications Act of 1996 * * * to interpret and enforce the terms of interconnection agreements" (*Teleport Communications Group, Inc.* v. *Illinois Bell Tel. Co.*, Nos. 97-0404, 97-0519 & 97-0525 (consolidated), at 10 (ICC Mar. 11, 1998) ("ICC March 11, 1998 Order")), agreed with the competing LECs. The Commissioners held that "by discontinuing its reciprocal compensation payments" on Internet traffic, Ameritech violated "its interconnection agreements, and its duty under the Act." *Id.* at 11.

Ameritech brought an action in federal district court against the Commissioners in their official capacities under 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331, seeking review of the determinations in the Commissioners' Order. The Commissioners moved to dismiss for lack of jurisdiction and on Eleventh Amendment immunity grounds. The district court rejected the Commissioners' arguments, finding jurisdiction to resolve Ameritech's complaint under section 252(e)(6) (Pet. App. 26a-29a & n.3), and holding that the Commissioners (i) waived the state's Eleventh Amendment immunity by participating voluntarily in the federal regulatory scheme under the Act (*id.* at 30a) and (ii) were subject to suit in the official capacities under the *Ex parte Young* doctrine, *id.* On the merits, the district court upheld the Commissioners' determination, characterizing the issue as "whether LECs are entitled to reciprocal compensation pursuant to section 251(b) of the Telecommunications Act for" Internet-bound traffic, and holding that the ICC did not err in determining that the agreements and section 251(b)(5) do, in fact, require reciprocal compensation on such traffic. *Illinois Bell Tel. Co.* v.

WorldCom Technologies, Inc., 1998 WL 419493, at *9, *12-*15 (N.D. Ill. July 23, 1998).

On appeal to the Seventh Circuit, Ameritech argued that (i) "the Act does not require reciprocal compensation" on Internet traffic, (ii) "the agreements precisely track the Act (reciprocal compensation is 'as described in the Act')," and (iii) "therefore the agreements cannot require reciprocal compensation for calls to ISPs." Pet. App. 19a. In other words, Ameritech did not argue that the Act *prohibited* Ameritech from agreeing to pay reciprocal compensation on Internet calls. Rather, Ameritech argued that (i) the Act did not *require* payment of reciprocal compensation on Internet calls, and (ii) Ameritech did not agree to pay reciprocal compensation on Internet calls, but instead entered into a binding section 252 agreement that limited Ameritech's reciprocal compensation obligations to the requirements of the Act.

Despite the court's earlier statement that "[d]ecisions of state agencies implementing the 1996 Act are reviewable in federal district courts" (*Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, 157 F.3d 500, 501 (7th Cir. 1998)), the Seventh Circuit declined to answer the primary question posed by Ameritech's challenge to the Commissioners' Order. Instead, after rejecting the Commissioners' Eleventh Amendment immunity argument, the court held that it lacked jurisdiction to decide whether the Commissioners erred in holding that the section 252 agreements required the payment of reciprocal compensation on Internet calls. Pet. App. 4a-5a. As the court explained, a claim that the Commissioners "'interpret[ed]' an agreement contrary to its terms creates a different kind of problem -- one under the law of contracts, and therefore one for which a state forum can supply a remedy." *Id.* Thus, the court refused to adjudicate Ameritech's claim that the ICC failed to enforce the provisions of the section 252

agreements that limited Ameritech's reciprocal compensation obligations to those "described in or required by the Act."

REASONS FOR DENYING THE PETITION

I. THE COURTS OF APPEALS UNIFORMLY HAVE HELD THAT STATE COMMISSION ACTIONS ENFORCING SECTION 252 INTERCONNECTION AGREEMENTS ARE DETERMINATIONS "UNDER SECTION 252" AND THUS ARE REVIEWABLE IN FEDERAL COURT UNDER 47 U.S.C. § 252(e)(6).

Petitioners first contend that this Court should review the Seventh Circuit's holding that federal courts have jurisdiction under section 252(e)(6) of the Act to review state commission determinations concerning the interpretation and/or enforcement of previously approved section 252 interconnection agreements. Pet. 12-18. This contention is without merit for several reasons.

A. To begin with, there is no circuit split. The federal courts of appeals uniformly have held that (i) state commissions are authorized under the 1996 Act to interpret and enforce section 252 interconnection agreements, and (ii) decisions interpreting and enforcing those agreements constitute "determinations under section 252." See, *e.g.*, *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications*, 2000 WL 1827576, at *3 (10th Cir. Dec. 13, 2000) (holding that under section 252(e)(6) of the Act, "[t]he district court * * * had jurisdiction to review the OCC's decision interpreting and enforcing the federally mandated Interconnection Agreement"); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) ("the state commission's power to enforce a federally mandated interconnection agreement arises from § 252, and thus a state commission's decision enforcing the agreement is a 'determination' under that section" that is reviewable in federal court under section

252(e)(6)); *Southwestern Bell Tel. Co.* v. *Public Util. Comm'n*, 208 F.3d 475, 479-80, 481 (5th Cir. 2000) (noting that "the Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved" and holding that "district courts have jurisdiction to review * * * interpretation and enforcement decisions of the state commissions").[2]

The FCC has reached precisely the same conclusion as the courts of appeals. *In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, FCC No. 00-216, ¶¶ 6, 9 (rel. June 14, 2000) ("*Starpower*") (holding that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements" lies within "the states' 'responsibility' under

[2] See also *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 338, 341 (7th Cir. 2000), petitions for cert. filed, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (No. 00-653) & 69 U.S.L.W. 3346 (U.S. Nov. 6, 2000) (No. 00-744) (holding that "[a] state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission" and that "Congress intended to provide for federal court review of any regulatory determination made under [section 252], whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its place"); *Puerto Rico Tel. Co.* v. *Telecomms. Regulatory Bd.*, 189 F.3d 1, 9-10 (1st Cir. 1999) (holding that a state commission action constitutes "a 'determination' under § 252" and thus "fall[s] within the jurisdictional bounds of § 252(e)(6)," if the aggrieved party's complaint alleges "a substantial nexus between the commission's determination and an interconnection agreement").

section 252" and assuming jurisdiction over interpretation dispute subject to "judicial review of [its] findings" under section 252(e)(6)).

Under these circumstances, there is no compelling need for this Court to review petitioners' first question. Moreover, the Seventh Circuit's resolution of that question plainly was correct. As the courts consistently have recognized, section 252 is the sole source of petitioners' authority to participate in the formation, approval, and enforcement of federally mandated interconnection agreements. See, *e.g.*, *Connect Communications*, 225 F.3d at 947 (holding that the "state commissions' power to enforce interconnection agreements springs from § 252"); *MCI Telecommunications Corp.*, 222 F.3d at 343 (holding that state commissions' "authority to act was derived from provisions of the Act and not from their own sovereign authority"). Section 252 makes clear that state regulators who choose to participate in the process of determining the interconnection agreement obligations that implement the 1996 Act must play by the federal rules of the game, and section 252(e)(6) gives federal courts jurisdiction to ensure that they do. The FCC likewise has stressed that the states are "permitted to continue to regulate in areas encompassed by the Act" — such as the basic procedural and substantive principles governing section 252 interconnection agreements — "only to the extent consistent with the Act and implementing FCC regulations." Brief for the United States and the Federal Communications Commission in Opposition in *Public Service Comm'n* v. *Wisconsin Bell, Inc.* and *Illinois Commerce Comm'n* v. *MCI Telecommunications Corp.*, Nos. 00-653 & 00-744 (U.S. filed Dec. 26, 2000). In short, the language, structure, and purpose of the statutory scheme make clear that state commission enforcement decisions are rendered "under section 252" and thus are reviewable under section 252(e)(6).

B. Petitioners' contrary contention rests on numerous flawed premises.

1. Ameritech does not quarrel with petitioners' initial observation that federal district court review is limited to "state commission determinations made *under section 252*." Pet. 12 (emphasis in original). But this observation simply begs the central question: whether a state commission's action in purporting to enforce the terms of an approved section 252 interconnection agreement constitutes a "determination under [section 252]" of the 1996 Act. As noted above, every federal court of appeals to have considered this question has answered it in the affirmative. Moreover, petitioners themselves reached the same conclusion when they asserted jurisdiction over this case.

In its complaint before the ICC, respondent Teleport Communications Group ("TCG") alleged that "[t]his Commission has clear and unquestioned authority under both the *federal Telecommunications Act of 1996* * * * and the [Illinois Public Utilities Act] to interpret or enforce the provisions of Interconnection Agreements." TCG Complaint at 5 (filed Sept. 8, 1997) (emphasis added). Respondent WorldCom Technologies, Inc. ("WorldCom") similarly invoked the Commission's jurisdiction "under the PUA and the specific authority granted to state commissions under *Section 252 of the Federal Act* to enforce the terms of the agreements i[t] approves." WorldCom Complaint at 10 (filed Oct. 9, 1997) (emphasis added). Even more damning to the Commissioners' current position, however, is their own statement that "[t]his Commission's jurisdiction *under* the Public Utilities Act and *Section 252 of the Telecommunications Act of 1996* * * * to interpret and enforce the terms of interconnection agreements is not disputed." ICC March 11, 1998 Order at 10 (emphasis added). In short, petitioners' belated insistence that they did not act under section 252 rings hollow in the face of their own

assertion of jurisdiction "under * * * Section 252" in the very Order that gave rise to Ameritech's section 252(e)(6) lawsuit.

2. In any event, petitioners' contention (at 13) that "[t]he only state commission determinations that can be made under section 252 are those determinations made in the arbitration and approval process" — which has been rejected by every court of appeals that has addressed it, as well as by the FCC — is wrong.

a. Petitioners first attempt to find support for their position in 47 U.S.C. § 252(e)(5), which directs the FCC to preempt non-participating state commissions. In particular, petitioners insist that "the FCC's authority to preempt state commission jurisdiction under section 252(e)(5) makes sense only with respect to the mediation and arbitration responsibilities given to state commissions under § 252." Pet. 13. This contention runs headlong into the FCC's own holding — which is entitled to *Chevron* deference — that it may preempt a state commission's jurisdiction over a dispute regarding the proper interpretation of the terms of a section 252 interconnection agreement if a state commission fails to carry out its "responsibility" under section 252 to resolve such a dispute. *Starpower*, ¶¶ 6-9.

Moreover, even if petitioners were correct in their assertion that "the FCC is not authorized to preempt state commissions' jurisdiction to hear complaints brought under *state law*" (Pet. 14; emphasis in original), *Starpower* demonstrates that a complaint seeking a state commission determination with respect to the parties' obligations under a section 252 interconnection agreement is *not* brought under state law. In *Starpower*, the FCC construed the 1996 Act to require it to perform the federal regulatory duties ordinarily undertaken by a state commission in a case — identical to this one — in which the *sole issue* is whether a section 252 interconnection

agreement requires the payment of reciprocal compensation on Internet traffic. *Starpower*, ¶ 9 (holding that the FCC would "proceed to resolve only the question that the Virginia Commission would have resolved had it chosen to act: *whether the existing interconnection agreements between Starpower and GTE and Bell Atlantic require GTE and Bell Atlantic to pay compensation to Starpower for the delivery of ISP-bound traffic*") (emphasis added). A necessary corollary of the FCC's construction of the Act is that a dispute over the scope of a party's obligations under a previously approved section 252 agreement arises under *federal* law.

b. Petitioners' related assertion (at 15) that "[t]he Act establishes a bright line between arbitrating and approving an agreement on the one hand and interpreting and enforcing it, on the other" has been soundly rejected by the courts of appeals and the FCC, which consistently have held that all of these regulatory tasks lie within the scope of a state commission's (or, in its place, the FCC's) regulatory functions under the Act. See cases cited at 9-11, *supra*. These decisions are clearly correct. When a state commission construes a previously approved section 252 agreement in a manner that deviates from the plain and "binding" terms of that agreement (47 U.S.C. § 252(a)(1)), it has effectively approved a new agreement (and rejected the old agreement). And Ameritech claims that petitioners did precisely that in this case.

Petitioners' suggestion that identical state commission determinations, one made in an arbitration and the other made in an enforcement proceeding, should be treated differently for purposes of federal review under section 252(e)(6) would frustrate Congress's manifest design to ensure uniform implementation of the 1996 Act through federal judicial review. As the Tenth Circuit recently explained, Congress "could not have intended" to adopt petitioners' arbitrary, time-based limitation on judicial review, because "certain state commission

decisions would escape federal review simply because the dispute arose after the agreement had been approved." *Southwestern Bell Tel. Co.*, v. *Brooks Fiber Communications*, 2000 WL 1827576, at *3 (10th Cir. Dec. 13, 2000). Under a sensible construction of the Act's judicial review provisions, federal court review must be available to ensure that all state commission (or FCC) determinations concerning federal interconnection obligations — whether they are made before, during, or after the approval of the pertinent section 252 agreement — are consistent with the federal Act. See *MCI Telecommunications Corp.*, 222 F.3d at 341 (noting that "Congress intended to provide for federal court review of any regulatory determination made under [section 252], whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its place").

As the Fourth Circuit has recognized, because many of the duties imposed by the Act are mandatory, parties often use language that "tracks the controlling law." *AT&T Communications of Southern States, Inc.* v. *BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000) (emphasis added). Such provisions are presumed to have been "negotiated *with regard to* the 1996 Act," and accordingly draw their meaning from the Act. *Id.* In other words, when "a provision plainly tracks the controlling law, there is a strong presumption that the provision was negotiated with regard to the 1996 Act and controlling law," and is intended to "comply with" and implement "the requirements of the Act." *Id.*

The section 252 agreements at issue here fit directly within the paradigm outlined by the Fourth Circuit: they provide that reciprocal compensation arrangements are "As Described in the Act." Such agreements, *by definition*, complied with the Act at the time of their approval, and thus there was no need for federal court review under section 252(e)(6) at that time. The need for federal judicial review arose later, when petitioners

effectively altered those agreements and in doing so stripped Ameritech of its rights under those agreements — which, by their express terms, strictly limited Ameritech's obligations to pay reciprocal compensation to the requirements of the Act. The Fourth Circuit has observed that it would "stretch the bounds of imagination" to construe a provision that tracks the Act to mean that the parties intended to impose obligations that deviate from the requirements of the Act. *AT&T Communications*, 229 F.3d at 465. And Ameritech alleges that that is precisely what petitioners did here. To exclude such claims from section 252(e)(6) would undermine Congress's manifest intent to ensure the uniform implementation of the requirements of the 1996 Act through "federal court review of any regulatory determination made under [section 252]" (*MCI Telecommunications*, 222 F.3d at 341), whether by state commissioners or by the FCC.

3. Finally, petitioners assert that "the Seventh Circuit's sweeping interpretation" of the "narrow judicial review provision" in section 252(e)(6) "radically shifts judicial review of many state commission actions involving purely local matters from state courts to federal courts." Pet. 10. This assertion is doubly flawed. To begin with, disputes over the obligations of telecommunications carriers under a federally mandated section 252 interconnection agreement — particularly where, as here, those obligations expressly are limited to the obligations prescribed by the federal Act — manifestly are not "local matters." As this Court has noted, with regard to those "matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the states." *AT&T Corp.*, 525 U.S. at 378 n.6. In addition, far from interpreting section 252(e)(6) in "sweeping" fashion, the court below read the scope of federal jurisdiction under that provision more narrowly than any other court of appeals. As petitioners

themselves note (at 9), the Seventh Circuit held that "every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer 'no.'" Pet. App. 5a. Contrary to petitioners' contention, the Seventh Circuit's interpretation does not "give[] federal district courts jurisdiction to review every state commission action concerning interconnection agreements." Pet. 1. In fact, it excludes a large class of disputes from federal court review in the Seventh Circuit that would be reviewable in federal court under the law of several other circuits.

As Ameritech has explained in its petition for a writ of certiorari in No. 00-921 — in which it seeks review of the court of appeals' decision below on grounds other than those asserted by petitioners here — the decision below holds that federal courts lack jurisdiction to decide the merits of a claim that a state commission failed to enforce provisions of a section 252 agreement that limit a carrier's obligations to the requirements of the Act, because "a state forum can supply a remedy" for that claim. Pet. App. 5a. The court's holding in *that* regard conflicts with decisions of the Eighth Circuit in *Southwestern Bell Tel.* Co. v. *Connect Communications Corp.*, 225 F.3d 942, 946-48 (8th Cir. 2000), the Fifth Circuit in *Southwestern Bell Tel. Co.* v. *Public Utility Comm'n*, 208 F.3d 475, 481-82 (5th Cir. 2000), and, most recently, the Tenth Circuit in *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications*, 2000 WL 1827576, at *3 (10th Cir. Dec. 13, 2000), all of which held that a claim that a state commission has disregarded express limitations on the scope of a carrier's obligations under a section 252 interconnection agreement is reviewable in federal court. The Seventh Circuit's "absurd jurisdictional scheme" (*Brooks Fiber*, 2000 WL 1827576, at *4 n.2) also conflicts with the FCC's Order in *Starpower*, CC Docket No.

00-52, FCC No. 00-216, ¶¶ 6-9, which treats a claim identical to the claim that was before the Seventh, Eighth, Fifth, and Tenth Circuits in the aforementioned cases as being federal in nature and thus reviewable in the federal courts.

In sum, then, the court of appeals below erred in construing section 252(e)(6), but the court's error was not in the breadth, but rather in the narrowness, of its view of the scope of federal jurisdiction under the Act. This Court should intervene to resolve the conflict and clear up the confusion concerning the question presented in No. 00-921, but should decline to review the jurisdictional question presented in this petition, on which there is neither conflict nor confusion.

II. THE SEVENTH CIRCUIT'S HOLDING THAT PETITIONERS WAIVED THEIR ELEVENTH AMENDMENT IMMUNITY BY PARTICIPATING IN THE ACT'S FEDERAL REGULATORY SCHEME DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY COURT OF APPEALS.

A. As an initial matter, this case is not a proper vehicle for consideration of either of the questions presented that relate to the Eleventh Amendment. The court of appeals below did not even mention *Ex parte Young*, much less consider whether that doctrine provided a basis for suing the Commissioners in this case. Nor did the panel undertake an independent analysis of the waiver issue (see Pet. App. 12a-13a); it simply followed the binding circuit precedent established in *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 168 F.3d 315 (7th Cir. 1999), in which the court held that the state commission's voluntary participation in the federal regulatory scheme under the Act constituted a waiver of Eleventh Amendment immunity and expressly declined to reach the *Ex parte Young* question. The Seventh Circuit subsequently vacated that opinion and granted rehearing in light of this Court's decisions in *Alden* v. *Maine*, 527 U.S. 706 (1999), *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), and *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank*, 527 U.S. 627 (1999). See *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 183 F.3d 567 (7th Cir. 1999). On rehearing, the panel reaffirmed its earlier holding that "in the particular circumstances present in these cases, the states have waived their Eleventh Amendment immunity by participating in the regulatory scheme created by the Act." *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 328 (7th Cir. 2000). In addition, as "an independent basis for decision," the court held that "the carriers may proceed with their respective federal claims for equitable relief against the individual commissioners under the *Ex parte Young* doctrine." *Id.*

The Seventh Circuit's decision on rehearing in *MCI Telecommunications* thus considered the Eleventh Amendment questions presented in this petition, and if those questions had any merit at all, *MCI Telecommunications* — in which both the Wisconsin and Illinois Commissioners have filed petitions for certiorari, Nos. 00-653 and 00-744 — would be a more appropriate vehicle for further review by this Court. In any event, even if the decision below had addressed the waiver and *Ex parte Young* issues, petitioners have not demonstrated any "compelling reasons" (Sup. Ct. R. 10) for granting review on those issues. Simply put, petitioners have failed to identify either a circuit split or a conflict with a decision of this Court that might be worthy of this Court's attention.

B. Petitioners raise the specter of a conflict between the Seventh Circuit's holding that the Illinois Commission's participation in the federal regulatory scheme set forth in the Act constitutes a waiver of Eleventh Amendment immunity and this Court's decision in *College Savings Bank*. This purported

conflict results from a misreading of both *College Savings* and the Act.

In *College Savings*, this Court reaffirmed the long established principle that a state may waive its Eleventh Amendment immunity by consenting to suit. 527 U.S. at 675-76. *College Savings* also confirmed that a state can manifest its consent to suit by accepting the benefits of a federal program that Congress has clearly conditioned on waiver of Eleventh Amendment immunity, provided that (i) the benefit could only be given by Congress, (ii) Congress is free to grant or withhold it, and (iii) the state is free to accept or reject it. *Id.* at 676, 678 n.2, 686-87; see also *Alden*, 527 U.S. at 755 (noting that Congress does not "lack the authority or means to seek the States' voluntary consent to private suits"). At the same time, the Court made clear that a state does not waive its Eleventh Amendment immunity by simply engaging in "otherwise permissible activity" that happens to be subject to federal regulation. *College Savings*, 527 U.S. at 687.

This Court illustrated through reference to its prior decisions the critical distinction between an invitation to waive immunity on the basis of a state's voluntary acceptance of a federal gratuity (which is permissible) and compulsion to waive immunity as a "sanction" for a state's participation in "otherwise permissible activity" (which is unconstitutional). The Court first discussed (and overruled) its decision in *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964), which had held that a state waives its Eleventh Amendment immunity simply by engaging in commercial activity that is subject to federal regulation. That decision, the Court concluded, was no longer tenable in light of *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), in which the Court held that Congress could not use its Article I powers to abrogate unilaterally a state's Eleventh Amendment immunity. Because "a congressional power to exact constructive waivers of sovereign immunity * * * would

* * *, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*," the Court overruled *Parden*. *College Savings*, 527 U.S. at 683. And because the statute at issue in *College Savings* subjected the states to suits for damages in federal court under the Lanham Act on the basis of the state's marketing of investment products — an "otherwise permissible activity" — the Court held that the state had not voluntarily waived its Eleventh Amendment immunity. *Id.* at 687, 691. In sum, *College Savings* held that Congress cannot make consent to suit a precondition for a state to engage in "otherwise permissible activity," because exclusion of a state from such activity is a "sanction" that "coerces" a state into consenting to suit.

At the same time, however, this Court in *College Savings* reaffirmed its holdings in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and *South Dakota* v. *Dole*, 483 U.S. 203 (1987), which together establish that Congress is free to condition a grant of money or authority that a state would not otherwise possess on the state's consent to suit in federal court. As the Court explained, conditions attached to a grant of federal authority (as in *Petty*) or federal funds (as in *Dole*) "are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful commercial activity." 527 U.S. at 678 n.2. For example, the condition attached by Congress as the price for its approval of the interstate compact at issue in *Petty* gave rise to a valid waiver upon acceptance of the condition by the state because "States cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity." *College Savings*, 527 U.S. at 686.

C. The fundamental error in petitioners' waiver argument is their failure to recognize that the waiver solicited by Congress under the Act falls plainly on the *Petty* and *Dole* side of the line, not on the *Parden* and *College Savings* side.

In the 1996 Act, Congress has enacted a comprehensive federal legislative scheme governing certain areas of local telecommunication competition. As this Court has noted, the states "unquestionably" have been preempted in those areas (*AT&T Corp.*, 525 U.S. at 378 n.6), and as a consequence they have no right to participate in the regulation of those areas under the new federal scheme. Congress, in its sole discretion, could have decided that the federal statutory scheme would be implemented exclusively by federal regulators.

Accordingly, administration of the Act's local competition provisions — including those relating to the arbitration, approval or rejection, and enforcement of interconnection agreements — is not an "otherwise permissible activity" in which a state may engage without Congress's permission. Rather, it is a wholly new activity, the terms and conditions of which were established by Congress. It is solely within Congress's purview to determine whether and to what extent state regulators should be involved in the administration of the Act's federal regulatory program. As with the formation of an interstate compact, participation in the administration of a federal regulatory program as a "'deputized' federal regulator[]" (*MCI Telecommunications*, 222 F.3d at 344) is something that states cannot do "without first obtaining the express consent of Congress," and therefore "the granting of such consent is a gratuity." *College Savings*, 527 U.S. at 686.

Here, of course, Congress has chosen to offer the states a role in the administration of the "new federal regime." *AT&T Corp.*, 525 U.S. at 378 n.6. Among other things, states are invited, through their public utility commissions, to participate in the arbitration, approval, and enforcement of interconnection agreements between incumbent and competing LECs. Congress also made clear that if a state chooses to accept the invitation to have its officials serve as deputized federal regulators, it must consent to review of its actions in federal

court. 47 U.S.C. §§ 252(e)(4) & (6). The imposition of this condition makes eminent sense, for as this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *AT&T Corp.*, 525 U.S. at 378 n.6. Section 252(e)(6) preserves national uniformity in the implementation of the 1996 Act, notwithstanding the involvement of state regulators in implementing that law. Under section 252(e)(6), if state officials are "not regulating in accordance with federal policy," there is "no doubt" that the "federal courts * * * may bring [them] to heel" by "draw[ing] the lines to which they must hew." *AT&T Corp.*, 525 U.S. at 378 n.6. And, finally, the Act does not compel a state commission to implement the Act's provisions. The states clearly retain the right to decline Congress's invitation. 47 U.S.C. § 252(e)(5). If a state does decline Congress's invitation, the Act merely provides that the FCC will step into the shoes of the non-participating state regulators, applying the same federal standards, again subject to federal judicial review. *Id.*

As the foregoing demonstrates, the 1996 Act presents states and their officials with the same sort of choice that this Court approved in *Petty* and *Dole* and again endorsed in *College Savings*. The opportunity to participate *as a regulator* in the implementation of a federal statute — an activity that did not preexist the 1996 Act and that Congress could have reserved exclusively to the federal government — is a far cry from engaging *as a regulated entity* in an "otherwise permissible activity." When a state operates a savings plan or runs a railroad, that activity ordinarily does not implicate unique federal interests. By contrast, when a state voluntarily acts as a deputized federal regulator, Congress has a special interest in ensuring that the state officials' actions conform to uniform federal standards. That is precisely what Congress intended to accomplish through its conditional invitation to the states under the Act, and any state that accepts Congress's invitation cannot

escape the consequences of its voluntary action. In short, the Seventh Circuit decision follows inexorably from this Court's reaffirmation of *Petty* and *Dole*.

Moreover, the only other court of appeals to have decided whether the waiver of Eleventh Amendment immunity solicited under the Act is valid under *College Savings* has reached precisely the same conclusion, on the same grounds, as the Seventh Circuit. *MCI Telecommunications Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 938 (10th Cir. 2000) ("by conditioning a state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity"), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593).

D. Petitioners also attempt to manufacture a circuit split on the basis of *GTE North* v. *Strand*, 209 F.3d 909 (6th Cir.), cert. denied, 121 S. Ct. 380 (2000), but the Sixth Circuit's brief discussion of waiver, in a footnote (see *id.* at 922 n.6), was plainly dicta. The parties neither briefed nor argued a waiver theory in *GTE North*, because the district court's jurisdiction over the preemption claim in that case was not based on the 1996 Act, but rather on 28 U.S.C. § 1331. *GTE North*, 209 F.3d at 912.

III. UNDER THE DECISIONS OF THIS COURT AND THE UNIFORM HOLDINGS OF THE COURTS OF APPEALS, PETITIONERS MAY BE SUED UNDER *EX PARTE YOUNG*.

A. Three federal courts of appeals have addressed the question whether an action seeking prospective relief against state officials, sued in their official capacities, for alleged violations of the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine. In *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir.),

cert. denied, 121 S. Ct. 54 (2000), the Sixth Circuit answered that question in the affirmative, holding that such a suit "is a straightforward *Ex parte Young* case." As the Sixth Circuit explained, "[u]nder *Ex parte Young*, suits against state officials seeking equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment." *Id.* The court then noted that (i) the Commissioners approved and are responsible for ongoing enforcement of the interconnection agreement and (ii) Ameritech alleges that the obligations imposed by the agreement violate federal law and seeks equitable relief. *Id.* On this basis, the court concluded that "Ameritech has stated a claim against the Commissioners * * * for equitable relief from an ongoing violation of federal law," and "[u]nder *Ex parte Young*, Ameritech is entitled to proceed." *Id.* Subsequently, the Tenth Circuit reached precisely the same conclusion, expressly "adopt[ing] the Sixth Circuit's rationale and holding" that such an action is "'a straightforward *Ex parte Young* case.'" *MCI Telecommunications Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 939 (10th Cir. 2000) (quoting *Michigan Bell*, 202 F.3d at 867), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593). And most recently, the Seventh Circuit reached the same conclusion, expressly "agree[ing] with the Sixth and Tenth Circuits that these suits are 'straightforward' *Ex parte Young* cases." *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 345 (7th Cir. 2000), petitions for cert. filed, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (No. 00-653) & 69 U.S.L.W. 3346 (U.S. Nov. 6, 2000) (No. 00-744). Accordingly, the only federal courts of appeals that have decided the question presented here are in full agreement with respect to the proper result and rationale.

B. The Commissioners' contention that a lawsuit against them under the 1996 Act conflicts with this Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), is simply wrong.

1. First, petitioners cannot point to any authority for their novel theory (see Pet. 21-24) that Congress must specifically authorize an *Ex parte Young* remedy. Indeed, were that the case, *Ex parte Young* would have been decided differently, because there is no indication that Congress specifically authorized the *Ex parte Young* remedy approved in that case.

2. Petitioners' contention that a party must allege a "constitutional violation" in order to invoke *Ex parte Young* (Pet. 24-28) is contradicted by numerous decisions of this Court and the federal courts of appeals. Under long established precedent, a party seeking to restrain state action may, consistent with the Eleventh Amendment, maintain a suit "when the action sought to be restrained is without the authority of state law or contravenes the *statutes* or Constitution of the United States." *Cory* v. *White*, 457 U.S. 85, 89 (1982) (emphasis added) (quoting *Worcester County Trust Co.* v. *Riley*, 302 U.S. 292, 297 (1937)). See also *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997) (*Ex parte Young* actions exist "to ensure the supremacy of federal *statutory* and constitutional law") (emphasis added); *MSA Realty Corp.* v. *Illinois*, 990 F.2d 288, 291 (7th Cir. 1993) ("the federal courts may exercise jurisdiction over suits alleging violations of federal constitutional *or statutory law* that are brought against state officials") (emphasis added); 17 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4232 (1988) (Under *Ex parte Young*, a "federal court is not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally, either because their action is alleged to violate the Constitution directly *or because it is contrary to a federal statute or regulation* that is the supreme law of the land") (emphasis added).

3. Finally, petitioners contend that the Seventh Circuit erred in allowing respondents to proceed under *Ex parte Young* because respondents "requested a declaration that the ICC

violated the law in the past" (Pet. 29), and thus did not allege the "ongoing violation" that *Ex parte Young* requires. Petitioners' suggestion that their order has no "ongoing" effects and, at most, constitutes a past violation of federal law is simply wrong. In arbitrating and enforcing interconnection agreements under section 252, petitioners exercise *coercive regulatory power*, and what results from the exercise of that power are carrier-specific government regulations that are legally binding on the parties unless and until they are set aside by a federal court pursuant to section 252(e)(6).

Moreover, the "ongoing" legal consequences of the Commissioners' orders are not confined to the parties to the agreement. Under section 252(i) of the Act, the terms and conditions that the Commissioners imposed on Ameritech in the enforcement proceedings in this case would be available to any other carrier that requests them. Under these circumstances, it is simply undeniable that the interconnection order that Ameritech is challenging here has "ongoing" legal consequences. Indeed, it is well established that an official capacity action against a state official may proceed under *Ex parte Young* even if the violation arises from past conduct, provided that the unlawful effects are ongoing and the relief sought operates prospectively. *Papasan* v. *Allain*, 478 U.S. 265, 282 (1986) (*Ex parte Young* action available to correct unlawful disparity in school funding resulting from past disposition of public lands). As the Fourth Circuit recently explained, "a future injunction is not made retrospective merely because it recognizes that an ongoing violation of law is the result of a past wrong." *CSX Transp., Inc.* v. *Board of Pub. Works*, 138 F.3d 537, 541 (4th Cir. 1998) (upholding an injunction against future collection of illegal taxes, even those that already had been assessed, as prospective relief under *Ex parte Young*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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